

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORENE G. BROCIOUS, *as Personal*
Representative of the Estate of
JAMES COPPAGE,

Plaintiff

v.

UNITED STATES STEEL
CORPORATION, et al.

Defendants

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Case No.: 1:18-cv-03823-SAG

Judge Stephanie A. Gallagher

**DEFENDANT UNITED STATES STEEL’S REPLY TO PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION TO EXCLUDE ROBERT HERRICK**

Plaintiff’s 19-page¹ Opposition fails to establish that Robert Herrick’s opinion meets the *Daubert* standard. There remains no basis for Herrick’s assumption that all three chemical solvents allegedly used by James Coppage had a 50% benzene concentration nor his assumption that Coppage used Hancolite at any of his prior employers. Plaintiff’s improper attempts to supplement Herrick’s report in her Opposition do not remedy this fatal deficiency, and this Court should strike Herrick as an expert and preclude him from testifying.

**I. No Evidence Supports Herrick’s Unreasonable Assumption That All Three
Chemical Solvents Used At Coppage’s Employers Contained 50% Benzene**

Under *Daubert*, this Court must exclude an expert’s opinion “when it is based on assumptions which are speculative and are not supported by the record.” Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1994). Even assuming for the sake of argument that Hancolite was used at Coppage’s employers, Herrick’s assumption that the other two solvents,

¹ When an expert has solid ground for her or his opinions as to something as simple as the identification of a product used, it does not require a 19-page brief to say so.

identified as U.S. Printing Ink and Sun Chemical products², also contained 50% benzene is patently ridiculous. Herrick admitted “there could have been a wide range of benzene contents in those cleaners.” Ex. 3 P. 131 L. 6-9. Herrick nonetheless contradicted himself by assuming 50% benzene content simply because “it’s consistent with what was going on in the practice of printing during that time period that benzene containing solvents were used.” Ex. 3 P. 50 L. 1-8. This leap of logic related to critical data renders Herrick’s testimony unreliable.

Herrick’s assumption that all three solvents must have had the same chemical compositions is clearly unreasonable. It is the same as saying that someone who used three different types of insulation and knew one had asbestos, can assume the other two had asbestos. It is analogous to concluding that where someone used three types of penetrating oils and one had kerosene as an ingredient, the other two oils must have had kerosene as an ingredient. It is like saying that someone who uses three different types of paint, one of which contained lead, could assume all three types of paints contained lead in the exact same percentage. Defendant could fill pages with similar examples but will spare the Court. The point is that Herrick’s assumption that the other two solvents, which no witnesses nor records identified, had the exact same chemical composition as Hancolite is based on pure speculation and is unreliable. Because the accuracy of Herrick’s cumulative exposure analysis is dependent on a proper estimate of the benzene content of the solvents Coppage used, Ex. 3 P. 51 L. 13-24 to P. 52 L. 1-4, this Court should strike Herrick’s opinion and preclude him from testifying.

II. Plaintiff Blatantly Misrepresents Robert Stallings’ Deposition Testimony To Support Herrick’s Unreasonable Assumptions

² The flawed assumption that these two solvents contained 50% benzene is critical to Herrick’s report. The testimony is that these two solvents were used more frequently than the Hanco solvent. Ex. 3 P. 30 L. 19-24 to P. 31 L. 1

Plaintiff's assertion that Stallings "identified use of Hancolite Glaze Cleaner at the Baltimore Sun and New American during years of Mr. Coppage's employment at each location" is blatantly false. Herrick and Plaintiff unashamedly twist and misleadingly quote excerpts of Stallings' testimony in an attempt to claim that Stallings identified Hancolite to support Herrick's unreasonable assumptions. However, **Stallings could not and did not identify the Hanco solvent used at his former employers by product name or product number nor did Stallings testify that the Hancolite label he was shown at his deposition was the label of the product he used.** Ex. 3 P. 22 L. 24 to P. 23 L. 1-11; P. 31 L. 10-15; P. 36 L. 23-24 to P. 37 L. 1-6. Herrick acknowledged this testimony in his deposition and then ignored it without an explanation. Ex. 3 P. 68 L. 6-24 to P. 70 L. 1-23; P. 71 L. 21-24 to P. 72 L. 1-9. Similarly, Herrick ignored both Stallings and Coppage's testimony regarding the color of the solvents they used, stating without any basis whatsoever that both witnesses "didn't recall correctly" or were mistaken about its color. Ex. 3 P. 53 L. 15-24 to P. 55 L. 1-13. Herrick's selective use of portions of Stallings testimony while ignoring any contrary evidence "fails to satisfy the scientific method and *Daubert* standard." Barber v. United Airlines, Inc., 17 Fed. Appx. 433, 437 (7th Cir. 2001).

III. Plaintiff Improperly Attempts To Supplement Her Expert's Opinion Through Her Opposition In Violation Of The Federal Rules

Plaintiff's Opposition continues the improper backfilling, that started in the hours and days before Herrick's deposition when Plaintiff and Herrick provided previously unproduced file materials and notes, to fill in the gaping holes in his opinions. However, supplements to an expert's opinions are not proper when they are "poorly disguised attempts to counter [Attorney's] arguments with new expert analyses." Southern v. Bishoff, 675 Fed. Appx. 239, 249 (4th Cir. 2017) (citing EEOC v. Freeman, 778 F.3d 463, 467 n. 7 (4th Cir. 2015)); see also Gallagher v. S. Source Packaging, LLC, 568 F. Supp. 2d 624, 631 (E.D.N.C. 2008) ("Courts distinguish 'true

supplementation’ (e.g. correcting inadvertent errors or omissions) from gamesmanship, and have therefore repeatedly rejected attempts to avert summary judgment by ‘supplementing’ an expert report with a ‘new and improved’ expert report.”)

Here, Plaintiff’s Opposition continues the pattern of supplementing Herrick’s opinions in response to Defendants’ arguments as she cites records from Defendant Handschy not relied on, discussed, or addressed by Herrick to support Herrick’s otherwise baseless assumptions that Hancolite was used at Coppage’s employers. Specifically, Plaintiff cites several documents, including Exhibit V, Exhibit H, Exhibit I, Exhibit R, Exhibit S, and Exhibit T, in her Opposition that Herrick did not cite in his report and that he did not reference during his deposition when specifically asked for the basis of his conclusion that Hancolite was used by Coppage. This Court cannot reward Plaintiff’s gamesmanship, nor can it permit Plaintiff to amend her own expert’s report through attorney argument in response to a Motion to Exclude. Herrick had a clear opportunity to provide the basis for his opinions in his report and his deposition, and his failure to opine as to the products used by Coppage and to adequately support his conclusions as to their benzene content do not meet the *Daubert* standard and should be struck from the Court’s record.

In the event that the Court has any doubt about the thin air out of which Dr. Herrick pulls his key product identification conclusions with respect to the solvents used by Mr. Coppage, Defendant requests a hearing during which Dr. Herrick can be cross-examined and during which the holes in his opinions can be exposed.

WHEREFORE, Defendant United States Steel respectfully requests that its Motion to Exclude Herrick be granted as Herrick’s opinions do not meet the *Daubert* standard and his opinions are no more than mere conjecture.

This the 23rd day of December 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2019, a copy of the foregoing Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgement on Statute of Limitations Only was filed and served via the Court's CM/ECF system on:

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